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Supreme Court, U.S.
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In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONER

Nothing in respondent's brief in opposition calls into question the need for this Court to grant, vacate, and remand or, alternatively, to review and reverse the decision below.

First, the respondent does not seriously dispute that the court of appeals misapplied the directions given by this Court when it acted favorably on the Commonwealth's previous petition for certiorari. Nor does it attempt to assert that the law of the case doctrine *precluded* the court of appeals from reconsidering its earlier decision in light of *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2275-77 (2002). Rather, respondent simply asserts that the court of appeals had discretion to ignore this court's directive and refuse to reconsider.

Second, the respondent does not contest that this Court's sovereign immunity jurisprudence is fundamentally different than it was a generation ago when *Hutto v. Finey*, 437 U.S. 678 (1978), was decided. Nor does it even attempt to demonstrate that, under current jurisprudence, *Hutto* is decided correctly. Rather, respondent, ignoring the jurisprudence of the last decade, simply asserts that *Hutto* should be allowed to stand.

Third, the respondent does not dispute that "if Congress intends to alter the usual constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1990). Nor does it even attempt to argue that, in enacting 42 U.S.C. § 1988, Congress clearly and unambiguously stated its intention *within the statutory text* to impose an attorney's fees regime that discriminates against the States. Rather, respondent, again ignoring this Court's most recent pronouncements, asserts that *Hensley v. Eckert*, 461 U.S. 424 (1983), is properly decided and should not be revisited.

I. This Court should grant the petition, vacate the judgment below, and remand with an explicit statement that the law of the case doctrine does not apply and that the court of appeals should reexamine whether, in light of *Gonzaga*, the respondent's suit is a § 1983 claim.

A. The law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, *not a limit to their power.*" *Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (emphasis added). "*A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance*, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) (emphasis added) (citations omitted). In other words, the doctrine is not jurisdictional; it is merely prudential. Thus, the court of appeals had the authority to revisit the issue of whether respondent's suit was a § 1983 claim.

Nevertheless, the respondent, apparently conceding the court of appeals' authority to revisit the issue, asserts that the court of appeals acted properly when it declined to do so. This is wrong for two reasons. First, any discretion that the court of appeals had to decline to reexamine the issue was foreclosed by this Court's explicit directive to reconsider. Second, if the court of appeals had discretion, then it abused that discretion by declining to reconsider. The issue of whether respondent's suit was a § 1983 claim should be decided in light of the *current* jurisprudence. To refuse even to consider the impact of a recent pronouncement of this Court is the epitome of an abuse of discretion.

B. Respondent asserts that *Gonzaga* has no impact on the issue of whether respondent's suit was, in fact, a § 1983 claim. *See Response Brief* at 9-13. For the reasons set forth on pages 10-12 of the Petition, the Commonwealth disagrees. Yet, the fact that the respondent and the

Commonwealth disagree about the impact of *Gonzaga* only underscores the need for the court of appeals to actually decide whether the respondent's suit was a § 1983 claim. The court of appeals has not decided the issue. This Court should not deny certiorari because the court of appeals *might* have agreed with respondent. Rather, this Court should instruct the court of appeals to actually *decide* if it agrees with respondent, which is essentially what this Court did when it remanded the case previously.

II. Alternatively, if this Court concludes that granting, vacating, and remanding is inappropriate, then this Court should grant review as to the second and third questions presented.

A. If a decision "was not correct when it was decided, and it is not correct today," then the decision "ought not to remain binding precedent." *Lawrence v. Texas,* 123 S. Ct. 2472, 2484 (2003). Indeed, this Court has shown a particular willingness to revisit its decisions concerning the role of the States in "our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002). For example, in 1989, this Court held that Congress could use its general Article I powers to abrogate the sovereign immunity of the States. *See Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Yet, a mere seven years later, this Court held that abrogation of sovereign immunity was possible only if Congress exercised its powers under § 5 of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 57-64 (1996). Similarly, in 1964, this Court held that mere participation in interstate commerce constituted a waiver of a State's sovereign immunity. *See Parden v. Terminal Railroad*, 377 U.S. 184 (1964). In 1999, this Court reexamined its decision and overruled it. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679-83 (1999). With this petition, the Commonwealth of Virginia asserts that *Hutto* and *Hensley* were wrong when they were decided and they are wrong today. Given this

Court's recent pronouncements on the principles of "dual sovereignty," this Court should reconsider whether *Hutto* and *Hensley* ought to remain as binding precedent.

B. Respondent's opposition to the reconsideration of *Hutto* altogether ignores the fact that, in the last few years, this Court's sovereign immunity jurisprudence has undergone a dramatic transformation.

1. As explained in more detail in the petition, *Seminole Tribe* and its progeny hold that congressional abrogation of sovereign immunity can be accomplished only if (1) Congress unequivocally expressed its intent to abrogate immunity for claims based on a specific statute; and (2) Congress acted pursuant to § 5 of the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 56-59. In deciding whether Congress acted pursuant to § 5 of the Fourteenth Amendment, this Court requires application of the two-part test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Even where Congress has passed a statute implicating the substantive guarantees of the Fourteenth Amendment, it may not abrogate sovereign immunity for that statute unless it can (1) "identify conduct transgressing the Fourteenth Amendment's substantive provisions" and (2) "tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 639 (1999).

Yet, respondent ignores these developments and argues that this Court's reaffirmation of *Hutto* in *Missouri v. Jenkins*, 491 U.S. 274 (1989), makes it unnecessary to reexamine *Hutto* in light of more recent precedent. *Respondent's Brief* at 14-18. Respondent misses the point. *Jenkins* was decided at the same time as *Union Gas*, where this Court substantially expanded Congress' power to abrogate sovereign immunity. Given that *Seminole Tribe* repudiated *Union Gas*, there must be serious doubt about the continued viability of *Hutto*. Respondent's

reliance on *Jenkins*, to the exclusion of more recent relevant cases, neatly underscores the need for this Court to revisit the question.

Quite simply, this Court has not yet applied its post-*Seminole Tribe* analytical framework to § 1988. As explained in the petition, that analysis raises a serious question whether § 1988 is a valid abrogation of sovereign immunity, at least in the context of a 42 U.S.C. § 1983 claim to enforce the Parity Act, 12 U.S.C. § 3801. The writ should be granted so that this Court may consider whether its previous interpretation of § 1988 meets the *Seminole Tribe* standard.

2. Respondent, apparently realizing that § 1988 does not meet the *Seminole Tribe* standard, argues that there is an alternative basis for the result in *Hutto*. Specifically, the respondent contends that the States historically have been liable for attorneys' fees as part of costs in federal court regardless of sovereign immunity concerns. *Respondent's Brief* at 18-21. In support of its novel contention, the respondent notes that the English Parliament and the colonial legislatures occasionally passed statutes that authorized courts to impose attorney fee liability on common litigants as part of costs. The Congress enacted similar measures at various times. Because common litigants were sometimes liable for attorneys' fees as part of costs, the respondent asserts that the States were liable for attorneys' fees as part of costs regardless of sovereign immunity.

This assertion is seriously flawed. It ignores the fundamental distinction between a common litigant, such as a private party or a corporation or even a local governmental entity, and a *sovereign*, such as the Crown, the United States itself, or one of the States. Quite simply, the mere fact that common litigants in the federal courts sometimes were liable for attorneys' fees as part of costs does not necessarily mean that the sovereigns, the United States and the States, were liable for attorneys' fees as

part of costs. Indeed, this Court has repeatedly recognized that, under basic principles of federalism, statutes that are applicable to common litigants are not applicable to the States.[1] *See Raygor v. Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002) (federal law which tolls statute of limitations on state law claims in federal court was inapplicable to the States); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) (The False Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70 (States may not be subjected to 42 U.S.C. § 1983 claims for damages). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (explicitly declining to rule on the issue of whether there is a private right of action to enforce Title VI against States). In other words, if respondent wishes to claim that the States historically have been subject to attorneys' fees as part of costs in federal courts, then the respondent must demonstrate that the States themselves, rather than common litigants, were subject to such liability. This they cannot do.

The States historically were not subject to liability for attorneys' fees in the federal courts for the simple reason that the States historically were not subject to the jurisdiction of the federal courts. *See Federal Maritime Comm'n*, 122 S. Ct. at 1870-71. *See also Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846, 857 (1824) (holding that sovereign immunity barred a suit against the

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[1] Respondent's reference to English practice is unpersuasive for the additional reason that the English rule concerning attorneys' fees is in sharp contrast to the American rule, where the opposite approach is generally followed. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. at 240, 247 (1975). Thus, even if the English rule allowed attorneys' fees to be awarded against the Crown – a claim not even respondent makes – it would not mean that an analogous practice was in place in America when the Constitution was ratified. "Of course, it is the American rather than the English common law tradition that is relevant." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

States). "The founding generation thought it 'neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons.'" *Alden v. Maine*, 527 U.S. 706, 748 (1999) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). This was true even if a state officer, rather than the State itself was named. *See Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 122-23 (1828). Indeed, it was not until 1908 that this Court firmly established jurisdiction to enjoin state officers who were violating federal law, *see Ex Parte Young*, 209 U.S. 123 (1908), and it was not until 1976 that this Court recognized a congressional power to abrogate sovereign immunity. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In sum, historically the States were not subject to the jurisdiction of the federal courts. Therefore, respondent is incorrect in its contention that the States have been historically subject to liability for attorneys' fees as part of costs in federal court.[2]

C. Additionally, this Court should grant review in order to reconsider *Hensley*.

1. Over the past two decades, this Court has recognized that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom" to be disregarded. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by

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[2] There may have been an exception for original jurisdiction actions filed by one state against another in the Supreme Court pursuant to Article III, § 2 of the Constitution. In such cases, the sovereign immunity of one litigant is counter-balanced by the sovereign immunity of the other, so that special rules may apply. In any event, the requirement that States reimburse the tribunal for the costs of litigation is fundamentally different from paying the legal fees of a private litigant.

O'Connor, J., concurring). To protect the delicate balance between the States and the federal government, this Court has insisted that the sovereignty of the States can only be diminished by a clear expression of congressional intent contained in the statutory text. *See Raygor*, 122 S. Ct. at 1006. In other words, if Congress is going to impose a scheme where those who sue the States and prevail will recover fees as a matter of course, but that prevailing States will recover fees in only the rarest of circumstances, the actual statutory text of § 1988 must say exactly that.

Respondent, apparently realizing that there is nothing in the text of § 1988 to support the result in *Hensley*, insists that the Clear Statement Rule should not apply. Instead, the respondent asserts that there is "abundant evidence of Congressional intent," and that this Court relies on "the legislative history of § 1988 in construing the statute." *Respondent's Brief* at 23-24. Respondent again ignores the fact that States, as sovereigns in our constitutional system, are fundamentally different from private parties or local governmental actors. As noted above, this Court has repeatedly recognized this distinction. *See Raygor*, 122 S. Ct. at 1006 (federal law tolling statute of limitations on state law claims in federal court was inapplicable to claims against States); *Vermont Agency of Natural Resources*, 529 U.S. at 779 (the False Claims Act is inapplicable to the States); *Will*, 491 U.S. at 70. (States may not be subjected to 42 U.S.C. § 1983 claims for damages.).

2. Finally, the respondent simply misconceives the fundamental nature of the question when it asserts that States "are treated no differently from any other *defendants*." *Respondent's Brief* at 23 (emphasis added). The issue is not that State defendants are treated differently from private parties who may be named as § 1983 defendants. The issue is that, under *Hensley*, State defendants are treated unfavorably compared to the private *plaintiffs* who have brought them into Court. The prevailing private

plaintiff is almost always allowed to collect attorneys' fees; the prevailing State defendant is almost never allowed to collect them. Even if the definition of costs could be legislatively expanded to include attorneys' fees, this uneven treatment is inconsistent with the even-handed approach that has traditionally governed the allocation of costs.[3] A departure from this traditional even-handedness may be constitutional where sovereign immunity is not an issue, or where sovereign immunity has been properly abrogated under Section 5 of the 14th Amendment; however, it cannot be sustained where – as here – the entire argument for subjecting States to attorneys' fees is based on the theory that it is *traditional* to do so. The Commonwealth has demonstrated why such a reading of American legal *tradition* is untenable; but, if that reading is to be accepted, then certainly the States must be entitled to its benefits as well as it burdens.

CONCLUSION

For the reasons stated above and in the petition for writ of certiorari, a writ of certiorari should be granted, the judgment vacated, and the matter remanded to the court of appeals with an explicit directive that the court of appeals should reexamine whether, in light of *Gonzaga*, the respondent's suit is a § 1983 claim. If this Court concludes that granting, vacating, and remanding is

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[3] This tradition of even-handedness is demonstrated by respondent's reliance on *Alyeska* for the proposition that "since 1607 English courts have been empowered to award counsel fees to defendants *in all actions where such awards might be made to plaintiffs*." Br. in Opp. at 10 (quoting *Alyeska*, 421 U.S. at 247 n.18 (1975)) (emphasis added).

inappropriate, then this Court should grant review as to the second and third questions presented.

Respectfully submitted,

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